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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Siskiyou)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL EMMETT HURLBURT,

Defendant and Appellant.

C058281

(Super. Ct. Nos.
SSCRF002700,
MCYKCRF05297,
MCYKCRF07749)

Defendant Michael Emmett Hurlburt appeals from an order of the Siskiyou County Superior Court denying his petition for a writ of error *coram nobis*. The basis for the petition was an alleged fraudulent misrepresentation relating to his plea agreement by his trial counsel.

The sole issue raised by defendant on appeal is that the trial court committed reversible error when it used a clear and convincing rather than preponderance of the evidence standard in denying the petition. We requested supplemental briefing regarding whether *coram nobis* was an appropriate means for testing his assertion that his plea and admissions had been

induced by his trial counsel's fraudulent misrepresentation. The parties have responded with defendant claiming *coram nobis* relief is appropriate and the People arguing to the contrary. For reasons to follow, we conclude defendant was not entitled to *coram nobis* relief in the circumstances of this case and shall dismiss the appeal.

FACTS AND PROCEEDINGS

A. Pre-petition proceedings

In December 2001, pursuant to a negotiated settlement, defendant pleaded guilty to one count of battery with serious bodily injury (count 1), one count of assault by means of force likely to produce great bodily injury (count 9), and admitted a prior serious felony conviction and an enhancement for being on bail during the commission of the offense charged in count 9. Per the settlement, defendant was sentenced to 12 years in prison, execution of sentence was suspended and he was granted five years' probation.

In November 2005 and April 2007, defendant was charged with additional crimes and enhancements. In June 2007, defendant, represented by retained counsel John Kucera, entered into a negotiated settlement whereby he pleaded guilty to possession of ammunition by a felon, to felony failure to appear and, as to each offense, admitted two prior strike convictions. He also admitted being in violation of his probation in the 2001 case.

In July 2007, the court lifted the stay of the previously suspended 12-year sentence and ordered it into effect. In the

two new cases, the court imposed consecutive terms totaling 9 years 8 months, that term to run concurrent with the 12-year term.

B. Petition proceedings

In August 2007, defendant, now represented by newly-retained counsel, filed a petition for a writ of *coram nobis* to set aside his guilty pleas in the latest two cases and his admission to having violated his probation in the probation case and to vacate the judgments. The ground for relief alleged was that the pleas and admission were induced by fraudulent misrepresentations made by Kucera. Following an evidentiary hearing, the court issued a written ruling denying the petition, stating that based upon a "clear and convincing" standard of proof there was "insufficient proof that Attorney Kucera misrepresented the potential consequences of [defendant's] plea and admissions."

For purposes of determining defendant's eligibility for *coram nobis* relief, we accept his testimony as true. (*People v. Odlum* (1949) 91 Cal.App.2d 761, 771-772.)

Defendant testified as follows:

He "got rid" of his attorney prior to Kucera because that attorney told him that the best deal he could get was 12 years. Defendant's wife then retained Kucera to represent defendant. Defendant, who remained incarcerated during his representation by Kucera, met only with Kucera in a jury room near the courtroom when defendant was scheduled to appear in court.

During pre-plea discussions, Kucera told defendant that he, Kucera, had a meeting with the prosecutor, the head probation officer, and the judge. Kucera said he had given the prosecutor a letter which caused a positive change in the prosecutor's attitude toward defendant; that the probation officer had stated that defendant had done enough time in prison and that he was "completely on board" with giving defendant probation; and that the judge was also "on board" and "was in agreement with all of this." Had it not been for Kucera's representations and assurances that defendant would receive probation, he would not have entered his plea.

Prior to defendant's signing the pre-plea form, which stated that defendant would be sentenced to a "lid of 12 years" with the possibility of probation for five years, defendant told Kucera that he did not feel right, that he was "putting [himself] out there." Kucera told him "not to worry" and that "there's nothing to worry about." Defendant signed the plea form.

When defendant orally entered his plea, the judge asked him if he was "promised anything." Defendant became extremely concerned and conferred with Kucera, who told defendant to either "Plead guilty" or say "No." Defendant again became concerned when the judge told him, "It is very unlikely that you are going to receive probation." Again, defendant conferred with Kucera and told him that this "sounds awful" and that it was "not what we talked about." Kucera told him that the judge

"has to say this" and that "everything is fine." Defendant accepted Kucera's explanation.

At the evidentiary hearing, the court also had before it the reporter's transcript of defendant's entry of his plea before Judge Robert Kaster. That transcript shows that when a question regarding defendant's eligibility for probation arose, the prosecutor explained that the plea agreement was for a 12-year lid and that defendant would be able to argue for probation, which necessarily entailed the striking of the strikes, which was a "hurdle that [defendant] was going to have to cross to get probation." To be sure that the defendant understood the eligibility posture of his plea, the prosecutor requested the court to query defendant in this regard.

The court explained to defendant that unless the strikes were stricken "there is no probation." The court explained that while it had the authority to strike the strike convictions, there existed "almost like a presumption that the court's not going to do that." The court further explained, "But [defendant] needs to know when he goes into this thing here today there is a likelihood, if not a probability, I think a probability is the better way to state it, that the court will not grant probation." Defendant stated that he understood what the court was saying. The court informed defendant that it would not be making a decision on the strikes issue until it had read the report of the probation officer. Again, defendant acknowledged that he so understood. Defendant then entered his pleas and admissions.

DISCUSSION

"In the absence of an allegation of state involvement, petitioner's allegation that counsel improperly induced him to enter a guilty plea does not state a ground for *coram nobis* relief. [Citations.]" (*In re Nunez* (1965) 62 Cal.2d 234, 236.)

"State involvement" is demonstrated where "the statements of the attorney amount to an unqualified factual representation (which is untrue) that the state or a responsible officer thereof, such as a judge or competent authority or a district attorney, has entered into a bargain purporting to commit the state to give the defendant a reward, in the form of immunity or a lesser punishment than he might otherwise receive, in exchange for a plea of guilty, where such representation is apparently substantially corroborated by acts or statements of a responsible state officer, is in good faith relied upon by the defendant, and actually operates to preclude the exercise of free will and judgment on the part of the defendant.

"The most critical point is substantial deprivation of the exercise of the free will and judgment of the party through an act participated in by the state. Mere advice and persuasion or the expression of matters of opinion by his own attorney will not suffice to vitiate the plea. Neither will unwarranted or even willfully false statements of factual matters by his attorney suffice. The private attorney is selected by the party and his agent. But if the representation of the private attorney presents a purported commitment by a responsible state

officer which if actually made would vitiate the plea and if the acts or statements of such state office, although innocently done or made, apparently corroborate the representation, are in good faith and without negligence relied upon by the defendant, and in truth operate to prevent the exercise of his free will and judgment, then the state in its solicitude for fairness will not accept the benefit of a plea so given." (*In re Gilbert* (1944) 25 Cal.2d 422, 443.)

Initially, as noted above, "In the absence of an allegation of state involvement, petitioner's allegation that counsel improperly induced him to enter a guilty plea does not state a ground for *coram nobis* relief." (*In re Nunez, supra*, 62 Cal.2d at p. 236.)

Defendant fails to cite to any location in the oral or written record before the trial court where he alleged that any statements or acts of the court, the prosecutor, or other state official, either corroborated Kucera's false representations or induced him to enter his plea. Indeed, the only reference to the necessity for allegations of state official involvement that we have been able to find came from the prosecutor when, during argument on the *coram nobis* petition, he pointed out that case law held that in the absence of misrepresentation by "some reliable public official" *coram nobis* was unavailable to set aside a plea. To this averment, defendant's counsel responded that the "case law is clear" and that pursuant to "People v. Thompson," which he had cited in his brief to the court, "a writ of *coram nobis* applies where a plea has been induced by fraud."

The only "People v. Thompson" in defendant's brief is the citation to 94 Cal.App.2d 578, a case which has nothing to do with a defendant's challenge to fraudulent representations by the defendant's counsel. Similarly, in defendant's closing argument brief to the trial court, he observed that "[t]he only issue is whether Kucera was credible, and [defendant] respectfully submits that he was not."

Defendant's only reference to corroboration of Kucera's fraudulent representations by a state official in his opening brief is the following. After citing case authority for the requirement that to obtain *coram nobis* relief based on counsel's misrepresentations, a defendant must show that such representations were seemingly corroborated by state official acts or statements, defendant states: "This was essentially defendant's position in seeking *coram nobis* relief: Kucera assured him that the prosecutor, probation officer, and court had all agreed that his guilty plea would result in reinstatement to probation; the language of mere possibility used in the plea form and in court was a meaningless but necessary formality. Thus, everything defendant saw and heard in court appeared to corroborate Kucera, who reassured him on that very point. The question raised in this appeal is, again: by what *standard of proof* must defendant make such a showing."

Aside from the above conclusory statement, defendant makes no attempt whatsoever to identify or establish how any acts or statements by the court or prosecutor corroborated Kucera's misrepresentations. Defendant simply moves on, dedicating the

remainder of his brief to arguing the trial court used the wrong standard of proof in deciding the petition.

In his supplemental letter brief, defendant fares no better. There, he recites, as we have set forth above, the court's and the prosecutor's statements made at the time of the entry of the plea regarding defendant's eligibility for probation and concludes: "By the end of the hearing, defendant reasonably would have understood that by pleading guilty he had fulfilled the first step of the oral agreement described by Kucera." We disagree that such conclusion would be reasonable.

As we have previously observed, the statements of the court and the prosecutor explained to defendant that to make probation a legal possibility the court would have to grant a motion to strike the prior strike convictions, that there was basically a presumption against such striking, and that the probability was that the court would not grant the motion. On this state of the record, it would be wholly unreasonable for defendant to infer that the court's or prosecutor's comments either actually or seemingly corroborated Kucera's false representations.

Defendant claims his case is substantially similar to *People v. Odlum*, *supra*, 91 Cal.App.2d 761. We disagree, concluding that *Odlum* is factually distinguishable. In *Odlum*, the defendant was sentenced to state prison after he pleaded guilty to issuing a check without sufficient funds and admitted a prior felony conviction. (*Id.* at p. 763.) In affidavits later filed in support of a petition for *coram nobis* relief, the defendant claimed that his plea and the admission were based

upon his attorney's having told him that the judge had agreed not to send him to prison, but instead would impose a jail term. (*Id.* at pp. 764-765.) According to the attorney, although the prior conviction precluded a grant of probation, the judge said he would solve that problem by reducing the conviction to a misdemeanor. (*Id.* at p. 764.) Defendant understood that he was ineligible for probation because of the prior conviction, however, because the court granted his attorney's request to file an application for probation and released him on bail he believed these circumstances "corroborated" the representations of his attorney. (*Id.* at pp. 765-766.)

The trial court denied defendant a hearing on the merits of his claim because it believed the law was "that when a man employs counsel he can't depend upon the fraud of that counsel to set aside a judgment such as this." (*People v. Odlum, supra*, 91 Cal.App.2d at p. 769.)

The appellate court observed that the trial court had misunderstood the law and that the court's permitting defendant to apply for probation even though he was ineligible and its releasing him on bail though "unconsciously and innocently seemingly corroborated" the statements of defendant's attorney and reversed the trial court's denial and remanded the matter for a hearing on the merits. (*People v. Odlum, supra*, 91 Cal.App.2d at p. 772.)

The statement and acts of corroboration cited by the court in *Odlum* are a far cry from those cited by the court in the present case. Here, the statements by the court and by the

prosecutor expressly informed defendant that he had little chance of obtaining probation, consequently there was no basis for defendant to believe that they corroborated Kucera's false representations.

Finally, defendant requests that, if we find that *coram nobis* does not lie, we treat his appeal as a petition for writ of habeas corpus. We decline that request.

DISPOSITION

The appeal is dismissed.

HULL, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.